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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CARMEN POWELL, Plaintiff, v. CITY OF CHULA VISTA; CHULA VISTA POLICE DEPARTMENT; DET. RUTH HINZMAN; AGT. ANDERSON; AGT. OYOS; SGT. CERVANTES; AND PERSON ENTITIES UNKNOWN; COUNTY OF SAN DIEGO AND SAN DIEGO COUNTY PROTECTIVE SERVICES WORKERS JULIE SMITH, NADIA NAJORS, MEGAN PETFINGER, REBECCA SLADE AND PERSONS AND ENTITIES UNKNOWN, CHILDREN'S HOSPITAL; DIANA CHASE, NURSE DEBRA DAVIES, LCSW, Defendants.	No. 07-cv-1836-JAH(JMA) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT Date: March 3, 2008 Time: 2:30 p.m. Dept.: 11 - Courtroom of the Honorable John A. Houston Trial Date: None

STATEMENT OF THE CASE

Plaintiff Carmen Powell alleges that she was arrested in her home by the Chula Vista Police Department on charges of domestic violence and that her children were there removed and themselves taken into custody by police and protective services social workers. (Cmplt. p.3 of 8.) These events occurred on August 17, 2006. (Cmplt.

p. 2 of 8.) Plaintiff alleges that fraudulent evidence was used to seize her children thus depriving her of constitutional rights. (Cmplt. p. 5 of 8.) As to one of her children, she alleges that the child, a daughter, came to her with injuries as a foster child. (Cmplt. p. 3 of 8.) By plaintiff's estimation, Child Welfare Services has held her children for more than one year. (Cmplt. p. 5 of 8.)

Throughout the complaint plaintiff alleges her involvement in court proceedings and filings ostensively related to the removal of her children. She specifically alleges having a first hearing on August 22, 2006. (Cmplt. 7 of 8.) And that under advice from counsel she stipulated to certain findings concerning her daughter gaining weight, that there was a lock on the refrigerator, no kitchen table, and to the existence of altercations between herself and husband, and she was to receive a reunification plan. (Cmplt. pp. 6-7 of 8.) Plaintiff alleges dissatisfaction with her attorney and the judge presiding over the proceedings. (Cmplt. p. 7 of 8.)

The complaint contains no express prayer, but appears to seek this court's involvement for the return of her children, even though she says a new petition proceeding has been filed against her. (Cmplt. p. 7 of 8.)

Defendant moves this Court to dismiss the plaintiff's complaint on issue preclusion grounds, for lack of jurisdiction, and because defendant Smith has absolute immunity. Consistent with the allegations of the complaint, plaintiff is already party to proceedings pending in the Superior Court of the State of California, Juvenile Division, in case number SJ11676. Orders and judgments have been issued that govern plaintiff's rights to child custody and visitation.

I

THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) BECAUSE IT IS SUBJECT TO A CLAIM PRECLUSION DEFENSE

A claim preclusion defense may be raised by a Federal Rule of Civil Procedure, rule 12(b)(6) motion to dismiss for failure to state a claim. *Stewart v. United States Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) [12(b)(6) motion to dismiss based on res judicata granted]. Under 28 U.S.C. § 1738 "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Board Of Education*, 465 U.S. 75, 81 (1984). The "judgment in the first action is deemed to adjudicate for purposes of the second action every matter which was urged, and every matter which might have been urged, in support of the cause of action or claim in litigation." *Hulsey v. Koehler*, 218 Cal.App.3d 1150, 1157 (1990).

With respect to the preclusive effect of prior orders and judgments, California Code of Civil Procedure section 1908(a) states in pertinent part.

> "(a) The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States , having jurisdiction to pronounce the judgment or order is as follows:
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> . . . . . . (1) In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration , or the condition or relation of the person.
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> . . . . . . (2) In other cases, the judgment or order is , in respect to the matter directly adjudged, conclusive between the parties and their successors in interest . . . litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the tendency of the action or proceeding."

Plaintiff's complaint herein appears to arise out of the same transaction and occurrence she alleges is involved in other court proceedings.

> "The doctrine of res judicata is intended to prevent multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration by precluding parties from relitigating issues they could have raised in a prior action concerning the same controversy. (*Panos v. Great Western Packing Co*. (1943) 21 Cal.2d 636, 637 [134 P.2d 242]; *Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67-68 [241 Cal.Rptr. 578]; 7 Witkin, op. cit. supra, §§ 188, 190-192, pp. 621-627.) The most important criterion in determining that two suits concern the same controversy is whether they both arose from the same transactional nucleus of facts. (*Nakash*, *supra* at p. 68.) If so, the judgment in the first action is deemed to adjudicate for purposes of the second action every matter which was urged, and every matter which might have been urged, in support of the cause of action or claim in litigation. (*Panos v. Great Western Packing Co., supra*, at p. 638.) In sum, res judicata precludes parties from splitting a cause of action into a

> series of suits in piecemeal litigation, since it operates as a bar not only when the grounds for recovery in the second action are identical to those pleaded in the first but also where a different theory or request for relief is asserted. (*Mattson v. City of Costa Mesa*, *supra*, 106 Cal.App.3d at p. 446; *McNulty v. Copp* (1954) 125 Cal.App.2d 697, 705 [271 P.2d 90].)"

Hulsey, 218 Cal.App.3d at 1157.

Plaintiff alleges that she stipulated to facts and circumstances resulting in a judgment and reunification plan pertaining to her relationship with her children. Proceedings involving plaintiff have occurred in the Superior Court of the State of California for the County of San Diego Juvenile Court Division as case number SJ11676. This Court may take judicial notice of the state court proceedings because they are directly related to the matters at issue. *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 fn. 2 (9th Cir. 2002). In considering the motion to dismiss, the court may rely upon matters judicially noticed. *MGIC Indemn. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Upon acquisition of a protective order from the Superior Court Juvenile Court Division pursuant to Welfare and Institutions Code section 827, copies of pertinent orders and court records pertaining to and which obviate plaintiff's claim that custody of her children was wrongfully taken from her will be submitted to this court for its review in connection with this motion to dismiss.

Because plaintiff alleges that she stipulated to the existence of facts showing an abusive home environment, including domestic violence, to the extent the Superior Court may have already made a determination regarding plaintiff's contest for the custody of her children, this Court is precluded by the doctrine of res judicata and collateral estoppel from revisiting that issue and plaintiff is estopped from alleging contrary facts in this action. See *Lucido v. Superior Court*, 51 Cal.3d 335, 341 (1990) (identifying requirements for issue preclusion under California law); *Bugna v. McArthur*, 33 F.3d 1054, 157 (9th Cir. 1994) (holding that federal courts must apply state law of collateral estoppel in determining collateral effect of state court judgment). Plaintiff cannot use this District Court as a forum to revisit the orders and judgments of the Superior Court. Plaintiff's complaint herein should be dismissed.

II

THE COMPLAINT SHOULD BE DISMISSED BECAUSE DEFENDANT SMITH IS ABSOLUTELY IMMUNE TO LIABILITY ON THE ALLEGED FEDERAL CLAIMS

Plaintiff's complaint against defendant Smith, a social worker, is premised upon her alleged involvement in the initiation and pursuit of custody and dependency proceedings in Juvenile Court that involved plaintiff and her children. Plaintiff does not allege that defendant Smith was even involved in the initial removal of the children from plaintiff's home.[1] Plaintiff's complaint should be dismissed because defendant Smith is absolutely immune to liability for her alleged "actions in investigating and presenting evidence to the dependency court." *Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003).

III

THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION TO REVIEW STATE COURT ORDERS AND JUDGMENTS CONCERNING JUVENILE DEPENDENCY AND CUSTODY MATTERS

Under the Rooker-Feldman Doctrine lower federal courts have no jurisdiction to review state court decisions. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Busch v. Torres*, 905 F.Supp. 766, 771 (C.D.Cal. 1995). In the present matter, plaintiff alleges in her complaint that proceedings involving herself and child protective services that pertain to the custody of her children have been brought against her, resulted in a stipulated order which has not been appealed or reversed, and that those proceedings are on going. Plaintiff cannot use this court as a forum to contest those proceedings. "Once a court issues an order, the collateral bar doctrine prevents the loser from migrating to another tribunal in search of a decision he likes better." (Citations omitted.) *Homola v. McNamara*, 59 F.3d 647, 651 (7th Cir. 1995). Plaintiff's complaint should therefore be dismissed.

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[1] Because plaintiff alleges that Chula Vista police removed the children, the complaint also fails to state any claim against social workers who might have taken custody of the children because under California Welfare & Institutions Code section 306(a)(1), a social worker may "receive and maintain, pending investigation, temporary custody of a minor who is described in section 300, and who has been delivered by a peace officer."

IV

BECAUSE PROCEEDINGS PERTAINING TO PLAINTIFF ARE STILL PENDING AND WOULD BE WITHIN THE EXCLUSIVE JURISDICTION OF THE SUPERIOR COURT THESE PROCEEDINGS SHOULD BE DISMISSED

Plaintiff alleges in her complaint that after entering the stipulation for order on the custody of her children, a new petition was brought against her again pertaining to the custody of her children. Under California Welfare and Institutions Code sections 302(c), and 304, the state courts would have exclusive jurisdiction over the issues of dependency under the circumstances alleged by plaintiff. Also because proceedings pertaining to plaintiff are pending in another court, the federal court should abstain and allow the state court to adjudicate the issues pertaining thereto, the disposition of which may make moot plaintiff's federal claim alleging familial interference. See *Younger v. Harris,* 401 U.S. 37, 49-53 (1971).

CONCLUSION

Plaintiff's complaint should be dismissed because it is barred by res judicata, collateral estoppel, the Rooker-Feldman Doctrine, because exclusive jurisdiction over issues pertaining to plaintiff's claim to custody of her children resides with the state courts, and because defendant Smith is absolutely immune to liability.

DATED: January 9, 2008 Respectfully submitted,

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